SUPREME COURT, U. S.

No. 407

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In the
Supreme Court of the United States
OCTOBER TERM, 1968

STATE OF LOUISIANA,
THROUGH C. MURRAY HENDERSON, WARDEN,
Petitioner,

v.

ALBERT GEORGE PROGUE, JOHNNY
JAMES WILLIAMS, AND ROOSEVELT WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ALBERT GEORGE PROGUE, JOHNNY JAMES WILLIAMS, AND ROOSEVELT WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Louisiana, through C. Murray Henderson, Warden of the Penitentiary, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 16, 1968.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 393 F. 2d 938, sub. nom. Wingate White, etc. v. Progue, et al., and printed infra, Appendix A, page 59. The opinion of the United States Court for the Western District of Lou-

isiana is reported at 271 F.Supp. 271, sub.nom. Progue, et al v. Middlebrooks, etc. and printed infra, Appendix A, page 61. The Decree of the United States Court for the Western District of Louisiana is printed infra, Appendix A, page 103. The opinion of the Louisiana State Supreme Court on the same issues and using the same transcript as herein, is reported at 243 La. 337, 144 So. 2d 352, nom. State v. Progue, et al, and printed infra, Appendix A, page 76.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 16, 1968, (infra, Appendix A, page 59). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

FIRST: Whether or not, in this pre-Miranda case, a Federal District Court, in considering the state court transcript in a non-evidentiary hearing upon an application for a writ of habeas corpus may ignore unrefuted facts indicating voluntariness of confessions, and seize upon disputed facts thoroughly rebutted indicating non-voluntariness of confessions in the same transcript, especially in light of 28 USC 2254(d), in order to reach its decision granting the writ.

SECOND: Whether or not as a matter of law the Federal District Court strayed from the legal tests laid down by the United States Supreme Court under pre-Miranda jurisprudence governing voluntariness of confessions.

THIRD: Whether or not as a matter of law, the Federal District Court strayed from the legal tests laid down by the United States Supreme Court in its previous jurisprudence governing illegal search and seizures.

STATUTES INVOLVED

UNITED STATES CONSTITUTION AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC SECTION 2254(d)—STATE CUSTODY IN FEDERAL COURTS; REMEDIES

* * * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a

whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondents, Albert George Progue, Johnny James Williams and Roosevelt Washington, were tried and convicted by the State District Court for the Parish of Caddo, State of Louisiana, on the charge of murder on June 17, 1961. On November 22, 1961, the Honorable Judge John A. Dickson, Jr., rendered a judgment against all three, sentencing them to death by electrocution as provided by the laws of the State of Louisiana, on a date and at a time to be fixed by the Governor of Louisiana. An appeal of this case was filed in the Louisiana State Supreme Court and that Court affirmed the conviction and sentence and a rehearing was refused by said Court on October 3, 1962. An application for writs to the United States Supreme Court was applied for on behalf of all three but apparently abandoned.

The respondents were then confined at the Louisiana State Penitentiary awaiting further action on the judgment. While so incarcerated, respondents filed an application for Writ of Habeas Corpus in the Baton Rouge Division of the Federal District Court. That court transferred the matter to the Western Louisiana Division of the Federal District Court under 28 U.S.C. 2241(d). The Honorable Ben C. Dawkins, Jr. rendered judgment, without an evidentiary hearing relying

exclusively upon a review of the State trial transcript and memorandum filed on behalf of both parties in favor of the three respondents herein, granting their application for a Writ of Habeas Corpus. The State of Louisiana, through the warden, timely appealed to the United States Court of Appeal for the Fifth Circuit which Circuit affirmed the District Court by opinion dated May 16, 1968. From this judgment the State of Louisiana now makes its application, as relator, in this Court for a Writ of Certiorari to the United States Court of Appeal.

REASONS FOR GRANTING THE WRIT

I.

The matter presents a serious question as to whether or not a Federal District Court can ignore the requirements of the statute governing writs of habeas corpus and thereby causing a writ to issue improvidently. The statute, 28 U.S. 2254(d) provides, in part,

"Section 2254. State custody in Federal Courts; remedies . . .

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written in-

dicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not recieve a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as

a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

This contention is based on certain facts which developed during the course of these proceedings in the Federal District Court below. Particularizing, when the State of Louisiana, acting through the warden, filed its response in the Federal District Court below, among its allegations, the following were included:[1]

13.

"Respondent further shows that all issues which are set forth in the application for a Writ of Habeas Corpus have been raised in the state trial court and that a transcript of the trial was prepared and submitted to the Louisiana State

[1]The full response by the State is printed infra, Appendix B, beginning at page 104.

Supreme Court, a copy of which is attached and made a part hereof.

14.

"Respondent further shows that a factual determination of all the issues in the present application for a Writ of Habeas Corpus (and other issues) was made after a hearing on the merits thereof by a State court of competent jurisdiction (the First Judicial District Court in and for Caddo Parish, Louisiana) in a proceeding to which the applicants and the State of Louisiana (through the District Attorney) were parties, as shown by transcript thereof which is attached hereto and made a part hereof and incorporated herein, particularly

(a) the oral opinion[2] of the trial judge (State Tr. 674-77) which ruled that the confessions were made freely and voluntarily, based on the "totality" of the facts;

(b) The trial judge's Per Curiam[3] to Bill of Exception No. 13 which is a written opinion to the same effect (State Tr. 249-261);

(c) Minutes of Court showing overruling of Motions for Severance (State Tr. 8-9);

(d) the trial judge's Per Curiam to Bill of Exception No. 2 which is a written opinion relative to Severance (State Tr. 144-46); and

(e) the opinion of the Louisiana Supreme

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[2]See excerpt from State Transcript, printed infra as Appendix C, page 118.

[3]See State Trial Court Per Curiam, printed infra as Appendix C, page 118.

Court on appeal of the whole case, reported in 243 La. 337, 144 So. 2nd. 352.

15.

"Respondent further shows:

(a) the merits of all factual disputes were resolved in State Court hearing, by the trial judge, the jury and the State Supreme Court;

(b) the fact finding procedure employed by the State Court was fully adequate to afford, a full and fair hearing, particularly on the free and voluntary nature of the confessions and the "totality" of the facts because

(1) The state, under Louisiana law, was compelled to first prove all facts surrounding the giving of the confessions before the trial judge alone, out of the presence of the jury, during which hearing the defendants were allowed to take the witness stand for the limited purpose of traversing the State's foundation; the defendants did each do so and likewise produced additional witnesses of their own; and then the trial judge ruled that the State had proved that the confessions were admissible evidence;

(2) The State was then compelled to again prove, before the jury, all facts surrounding the giving of the confessions so as to show the "totality" of the facts and to convince the jury beyond a reasonable doubt that the confessions were in fact given freely and voluntarily;

(3) the defendants, in their case in chief before the jury, again testified in their behalf to traverse the State's foundation and again pro-

duced the same and other additional witnesses; all as shown by State Tr. 270-1245. (These last four volumes of the transcript contain all of the testimony and evidence relating to the facts surrounding the giving of confessions, including testimony adduced out of the presence of the jury and testimony before the jury.)

(c) All of the material facts were more than adequately developed at the State court hearing, some of them several times;

(d) the State court did have jurisdiction both of the subject matter (state crime of murder) and over the persons of the applicants herein, in the State court proceeding;

(e) Although there was no proof of indigency by the applicants, the State court appointed separate counsel for each applicant, which counsel were competent and had at least five years' practice in Louisiana (one had practiced for more than 24 years with active criminal experience for many years), and said counsel were appointed on May 17, 1961, the very next day after the indictment was returned on May 16, 1961 (and long before formal arraignment);

(f) each of the applicants received a full, fair and adequate hearing in the State court proceeding, which consisted of (among other things) full arguments on all pre-trial motions, a complete 12-man jury trial which required a unanimous verdict under State law, many months to perfect all desired Bills of Exception, full arguments on the Bills of Exception and post-conviction Motions (Motion for New Trial and in Arrest of Judg-

ment) and unlimited time for briefing and argument in the Louisiana Supreme Court on appeal;

(g) under the present jurisprudence of the United States Supreme Court as of the date of the filing of this Response, your Respondent shows that no one of the applicants was in any wise denied due process of law in the State court proceedings; and

(h) *an examination of the transcript attached hereto and of the opinion of the Louisiana Supreme Court, will show that the "record in the State court proceeding, considered as a whole" leads to the inevitable conclusion by this Honorable Court that the factual determination is more than "fairly supported (indeed, overwhelmingly supported) by the record."* (Italics Supplied)

The response, quoted above in part, shows conclusively that this case falls squarely within 28 U.S.C. Section 2254(d). The Federal District Court ordered no evidentiary hearing because the parties stipulated *"that the State Court record contained all of the relevant facts and they chose to rely solely upon that evidence . . ."* (Italics supplied) [4] Considering this stipulation the Federal District Court was at that moment presented with a case squarely within 28 U.S.C. Section 2254(d). No question exists as to whether or not the State Court is a court of competent jurisdiction. Therefore, if the State Court record contained a determination after a hearing on the merits of the same issues as here, the determination, evi-

[4] See Opinion of Federal District Court, printed infra, Appendix A, page 63.

denced by a written finding, opinion or other reliable written indicia, shall be presumed correct.

An examination of the State Court Record shows that the same includes a thorough determination of the issues in this case, as evidenced by its Per Curiam to Bill of Exception Number 13, printed infra, Appendix D, page 118. This alone was enough to create the presumption. Furthermore, the State Court in its Per Curiam was enlarging on rulings already rendered earlier in the trial when ruling on the admissibility of the confessions and the arrests. This portion of the State Court transcript is printed infra, Appendix C, page 113.

These two items in the State Court record point up how clearly the issues in this case fall inescapably within the purview of 28 U.S.C. 2254(d).

The next question is whether or not the presumption created by 28 U.S.C. 2254(d) was or can be overcome by the occurrence of any of the eight (8) circumstances outlined in the statute as sufficient to overcome it. As to the first exception, it is indisputable that the merits of the factual dispute were resolved in the State Court hearing. As to the second, a reading of the State Court judge's Per Curiam conclusively shows the fact finding procedure was more than adequate in affording these three people on trial a full and fair hearing. Furthermore, the material facts were more than adequately developed as to statements, confessions and illegal seizures both within and without the hearing of the jury. No possibl[illegible]stion

exists about the State Court's jurisdiction or about appointment of counsel. The State Court Transcript from beginning to end indicates these three defendants were blessed with the most competent sort of defending counsel. The sixth exception could not and did not occur because the State Court Transcript indicates the State Court trial was as full, fair and adequate insofar as constitutional points are concerned as any pre-Miranda case could be. Furthermore, no allegation appears in the application for writs setting up any other grounds denying due process than those issues ruled on by the State Court trial judge, therefore no substance exists as to the seventh exception.

As to the eighth exception of 28 U.S.C. 2254(d), a close reading of the Federal District Court's opinion indicates no where a conclusion that the State Court's factual determination is not fairly supported by the State Court record. The conclusion is inescapable that the Federal District Court, without a single reference or thought of comity, simply ignored the State Court's determination.

The State of Louisiana respectfully suggests the provision of law, 28 U.S.C. 2254(d), was put into the Federal statute not merely because of comity, but mainly to prevent the very error complained of herein, namely, a Federal District Court completely ignoring a State Court determination so as to create a "second-guess" situation against which society has no way to defend itself. It is respectfully submitted such is the case here because in this case the Federal District Court completely ignored the undisputed facts in the

record which tended to show voluntariness of the three confessions involved and embraced exclusively the hotly disputed and thoroughly refuted facts tending to show involuntariness, directly in the teeth of the State Court's determination, and in thorough violation of 28 U.S.C. 2254(d). The statute, after all, cannot be and is not meaningless. It is on the books because Congress felt Federal Courts should not "second guess" equally competent State Courts, and because this law prevents defendants from laying the groundwork in a State Court trial that can always be used in a Federal Court later since the State Court's determinations won't mean anything anyway.

Unless the Supreme Court of the United States enforces 28 U.S.C. 2254(d) State Court determinations will be reduced to mere administrative pronouncement on matters that will inevitably be tried *de novo* in subsequent Federal Court habeas corpus proceedings. This Court should order certiorari to review this phase of the case, if nothing else, because of the immense impact the evolving constitutional jurisprudence is having within our judicial system.

II. & III.

This matter presents two serious questions alternatively. Should the foregoing questions be decided against the State of Louisiana, then we submit the Federal District Court, and the United States Court of Appeals for the Fifth Circuit in affirming the Federal District, committed reversible error by improperly applying the rules of this Court in disposing of

the factual issues in this pre-Miranda case as to confessions and disposing of factual issues as to searches and seizures. These points are considered together in the course of argument following.

The Federal District Court in its opinion below[5] first states the rule, but then fails to follow it in reaching its conclusion on the facts. For example, the Court stated in its opinion that "The question of our determination is whether, considering the totality of circumstances, petitioners' statements were involuntary and should have been excluded." The State of Louisiana has no quarrel with this test but it does quarrel with the Court's subsequent failure to consider "the totality of the circumstances" just mentioned as a part of the test to be applied. Specifically, the error was in choosing to employ only the hotly disputed and thoroughly refuted facts in the State Court record championed by the three applicants, and ignoring the undisputed facts in the State Court record championed by the State of Louisiana.

A complete review of the factual situation[6] is necessary to bring out the justification of the State's quarrel.

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[5]Infra, Appendix A, page 61.

[6]In doing so, all reference to transcript are to the State Court Transcript made during the State Court trial. These references coincide with those used in the Federal District Court's opinion, and the said State Court Transcript forms a part of the original record from the United States Court of Appeals for the Fifth Circuit, already forwarded to this Court. The State Court Transcript is not printed infra, except in part wherever otherwise noted in this application.

Jang Gow was an elderly Chinese widower who had operated the New York Cafe at 1038 Texas Avenue, Shreveport, Louisiana, with his son, Nuey Gow, since 1950. He lived in living quarters in a room at the rear of his cafe.

During the early morning hours of December 14, 1958, and in the course of the commission of an aggravated burglary and a robbery by the appellees, Mr. Jang Gow was beaten about the face and head in his bedroom, in the hallway immediately outside the bedroom, and also at the place where the cash register was located. The weapon used in the beating of Mr. Gow during the robbery and burglary was a pistol owned by A. G. Progue, one of the appellees.

In March, 1961, Detective Sgt. Roberson, a city officer, was in possession of certain leads that gave him probable cause to arrest the relators. He discussed the matter with his superior and subsequently arrested each of the respondents on a Friday evening in the latter part of March, 1961.

Respondent Roosevelt Washington was allowed to return to his home for the night, after his arrest, upon his promise to return the next day about 10:00 A.M. which he did so. He gave a statement within two hours upon his return which tended to implicate the other two respondents. He later that same day made a second statement to the same effect as the first one. Neither of these statements were offered into evidence.

It was a few days after these statements were made that Officer Roberson was without a partner in

as much as his regular partner, Major Borland, was retired. It was not until a Lt. Pynes was assigned to work with Officer Roberson on the 30th day of March that Roosevelt Washington's statements were recorded and which was later typewritten as his police statement. Shortly thereafter Washington voluntarily went with the aforementioned Roberson and Pynes to his home where he produced for them a jacket which he said was the one that he wore when the crime was committed by the respondents herein. As Roberson and Pynes were on the night shift, it was after the return from Washington's home that he made a second recorded statement at the Sheriff's Office. Washington then agreed to go to the scene and point out the part that he and the others played in the commission of the crime.

The re-enactment at the scene was made by Washington the next day, on March 31st, in the presence of Pynes, Roberson, the Chief of Police, the Police Commissioner, the District Attorney, the son and grandson of the deceased, and photographers and representatives of the press, radio and television facilities.

Subsequently, Washington examined and identified a pistol, which the officers later recovered as being the pistol which Progue used in beating Mr. Gow. Then, on Sunday, April 2nd, Washington signed the Police Statement.

During the day on April 4th Washington was transferred from the City Jail to the Parish Jail by Police Officers who had no other connection with the

case. Later on during that day, the Coroner's office requested the Sheriff's Department to bring each of the men down for the purpose of seeing if they wished to make a statement to the Coroner. A Deputy Sheriff Pittman was assigned for that purpose and he had no other connection with the case before or after that time.

At the Coroner's office there were no police officers present, but merely the Deputy Coroner, (Dr. DeLee, now Coroner) the District Attorney, and Deputy Pittman. At that time and place, Roosevelt Washington gave an oral statement to the Coroner, which was taken down on the recording machine operated by Dr. DeLee.

Three days later, on April 7th, the Coroner's office again requested that the men be brought down separately to hear their statements read after they had been transcribed. A Deputy Ira Tilley was assigned for that purpose, and he had no other connection with the case before or since that time.

There, in the Coroner's office in the presence of Deputy Tilley and Mrs. Frey, the Coroner's typist, the statement was read to Washington, he said it was correct, and he then signed the original and several copies, along with the other two persons who signed as witnesses.

While the jury was out, the State produced all of the officers who had had any contact with Roosevelt Washington from the time of his arrest until he signed the Coroner's Statement. These persons includ-

ed City Police Officers Sgt. Roberson, Major Borland, Lt. Pynes, Chief of Police Teasley, Police Commissioner Downs, Dr. DeLee, Mrs. Frey, Deputy Pittman and Deputy Ira Tilley. (It was also stipulated that the testimony of the District Attorney would be the same as that of Chief Teasley at the time of the reenactments, and the same as Dr. DeLee at the time of the giving of the Coroner's Statements—see Tr. page 996) (The State also produced Captain Bryant, Deputy Sheriff, who was present at one interview of Progue by Borland and Roberson.)

The first thing that the Coroner did at the time of the giving of the oral statements (after each accused said he wished to make a statement) was that the Coroner read to each respondent his signed Police Statement and asked him if it was TRUE. Washington so answered affirmatively without any corrections.

While the jury was out, Washington took the stand and, although he answered various leading questions, Washington never testified that he was struck, beat or hit.

Moreover (as shown on page 579, lines 20-23 and several times on page 580 of the Transcript), Washington testified on direct examination at least FOUR TIMES to the effect that his statement to the doctor (Coroner's Statement) "was made of my own free will."

Since the Coroner's Statement included the Police Statement verbatim (and also other information in addition to the facts detailed in the Police Statement),

and since Washington made absolutely NO CLAIM as to any beating, the District Attorney did not cross-examine Washington at all.

Washington then, by his own testimony on direct examination (without any cross-examination) before the Judge, out of the presence of the jury, acknowledged that his statement was made freely and voluntarily, as the Court so held (Tr. 257, 259, 676).

Turning next to Johnny James Williams, the record shows that Williams was arrested by Sgt. Roberson on his job in the presence of his employer during the late afternoon on the same Friday that the other two respondents were arrested. He was questioned briefly the next day (Saturday).

Subsequently (after Roosevelt Washington made his recorded statement at 9:20 P.M., on March 30th, and also after Washington had obtained his jacket shortly after midnight) Williams went with Pynes and Roberson to his brother's house and there recovered a checkered car coat which he identified as being his and which he had given to his brother. Williams was not questioned any more that night (the night of March 30-31) although Washington had implicated him.

Then, about 9:00 A.M. that morning, March 31st, Williams sent word to Chief Teasley that he wished to make a full statement. Teasley explained to him that the regular procedure would be for him to make a statement to Pynes and Roberson, Williams agreed to this, so those two officers, who were at home asleep,

returned back to the Police Station about 10:00 A.M. on March 31st.

Williams then made to them an oral statement which was substantially the same as his final Police Statement which he signed. Williams also agreed to make a recorded statement, and he did so at the Sheriff's Office that same day in the presence of Pynes and Roberson.

Williams also agreed to make a re-enactment of the crime at the scene, which he did do in the late afternoon of March 31st, right after Roosevelt Washington and in the presence of the same persons who had been present at the time of Washington's re-enactment.

Just as in the case of Washington, Williams likewise subsequently identified the pistol which the officers later recovered, he also signed his Police Statement on Sunday, April 2nd, he was transferred to the Parish Jail by other police officers on April 4th, and later that day he made his oral statement to the Coroner, which was taken down by the Coroner on a recording machine in the presence of the same persons as was done with reference to Roosevelt Washington.

Subsequently, on April 7th, Williams was brought back to the Coroner's office and there, in the presence of Deputy Tilley and Mrs. Frey, his transcribed statement was read to him, he said it was correct, and he then signed the original and several copies, along with the other two persons who signed as witnesses.

While the jury was out, Williams took the stand

for the limited purpose of traversing the State's foundation showing that his statements were freely and voluntarily made.

At that time, on cross-examination, Williams acknowledged that:

on March 31, at 9:00 A.M., when he spoke to Chief Teasley and Commissioner Downs, he made NO COMPLAINT to them about anyone mistreating him in any way (Tr. 535, lines 26-30; page 536, lines 1-5);

on March 31, he made NO COMPLAINT to Captain Bryant when he made a recording in the Sheriff's Office about any alleged mistreatment (Tr. 536, lines 6-17);

when Lt. Pynes was first assigned to the case, he made NO COMPLAINT to him about any mistreatment of him by either Major Borland or Sgt. Roberson (Tr. 536, lines 18-22, page 537, lines 17-19, 29-30, and page 538 lines 1-11);

he made NO COMPLAINT to the District Attorney as to any mistreatment by any persons when he met the District Attorney and discussed this case with him at the re-enactment of the crime (page 539, lines 23-30 and page 540, lines 1-9); and

he made NO COMPLAINT to the Coroner on April 4th (Tr. 545, lines 19-20) nor to Deputy Sheriff Tilley on April 7th (Tr. 546, lines 1-8), even though there were no City Police officers present on April 4th and April 7th.

Also, on cross-examination, Williams acknowl-

edged and repeated many of the things which he had said and pointed out at the re-enactment (see Tr. page 541, lines 2-30; all of page 542; all of page 543, and page 544, lines 1-25). Williams further testified to matters showing that the giving and the signing of his Coroner's Statement were done freely and voluntarily (see Tr. page 544, lines 28-30; all of page 545, and page 546, lines 1-19).

A typical example of the testimony of Williams on cross-examination about the re-enactment is as follows:

"Q But, you do remember all these other things that you and I have just discussed?

A Yes, sir.

Q Now, did you not at that time and place at the re-enactment of the crime, did you not tell me all those things freely and voluntarily on your part?

A Yes, sir.

Q And did you not answer questions that I asked you?

A Yes, sir.

Q And if I asked you a question or something that you didn't know about, didn't you tell me that you didn't know about that?

A Yes, sir.

Q But, you have told us tonight what you told me that day at the re-enactment of the crime. Is that correct?

A Yes, sir.

Q And at that time and place when I was questioning you, I made no threats to you. Isn't that correct?

A That is right.

Q And I didn't promise you anything. Isn't that correct?

A That is right.

Q And I was asking you for information. Wasn't that correct?

A Yes, sir.

Q And you were answering my questions?

A That is right".
(Tr. page 543, lines 26-30; page 544, lines 1-8, and 13-25.)

A typical example of the testimony of Williams relative to the giving and signing of the Coroner's Statement is shown as follows:

"Q And Dr. DeLee did read you the Police Statement which you had previously signed and asked you if you had signed it, and asked you if it was correct?

A Yes, sir, he asked me was that the statement that I had signed at the police station.

Q And didn't he also ask you was that statement correct?

A Yes, sir.

Q And your answer was yes, was it not?

A Yes, sir".
(Tr. page 545, lines 9-17.)

"Q Then, three days later on April 7th, when you were brought back by still a different deputy sheriff, the last one that testified, the red-headed gentleman named Tilley, did you make any complaint to him, either, on your way to the coroner's office where you signed that coroner's statement, or on the way back to jail?

A No, sir, I didn't make any complaint to him.

Q Now, had you ever seen that officer before?

A No, sir.

Q And had you ever seen before the officer who brought you down for the original recording of the coroner's statement?

A No, sir.

Q They didn't do anything to mistreat you, did they?

A No, sir.

Q They didn't tell you what to say, did they?

A No, sir, they did not.

Q They didn't promise you anything, did they?

A No, sir".
(Tr. page 546, lines 2-20.)

Although Williams claimed that he was under pressure and although he made vague hints about alleged mistreatment, the only definite complaints were approximately three in number. One was that Sgt. Roberson "hit me or something like that," (which was

positively denied by Roberson); that he was cursed by Pynes and Roberson, and by no one else (which was also positively refuted by Pynes and Roberson), and, finally, that Pynes and Roberson indicated to him that they would get the District Attorney to sentence him to two or three years (which was also emphatically denied by Pynes and Roberson), although Williams testified on cross-examination that he knew that sentences were passed only by judges and never by any District Attorney (Tr. page 564, lines 6-8).

Not only was this last claim fantastic (as the Court so held), but Williams also falsified his testimony when he stated positively that Mrs. Frey did not read to him his transcribed Coroner's Statement on April 7th.

In light of the testimony of Williams (out of the presence of the jury) in which he acknowledged many facts showing that his statements were freely and voluntarily made, that the re-enactment by him was likewise voluntarily made and, further, in light of the fact that the State produced all the witnesses who ever had any contact with Williams, (all of whom stated positively under oath that Roberson never hit or struck Williams, that the officers did not curse him, and they made no such fantastic promise of guaranteeing a light sentence by the District Attorney), the Trial Court held the statements to be freely and voluntarily made by Williams.

On this point, the Trial Judge said in making his ruling:

"Williams' statement and Washington's statements are, by their own testimony, admissible, free and voluntary, and obtained without duress and without intimidation, and without promise of reward."

See, also Tr. 258, (Per Curiam of the Trial Judge), wherein the judge discusses the acknowledgments by Williams that he never made any complaint of any alleged mistreatment (although he had ample opportunity to do so) to various separate law enforcement officers at times when Roberson and Pynes were not present; and wherein the judge also mentioned the fact that Williams confirmed what he had said and had pointed out at the re-enactment.

Turning to the factual matters concerning the respondent Progue, the record shows first that he was arrested by Roberson at his home on a Friday evening. The next evening he was questioned at the Caddo Parish Jail by Major Borland and Sgt. Roberson in the presence of a Captain Bryant, a Deputy Sheriff. This was on Saturday and he was likewise questioned briefly the next day by Major Borland and Sgt. Roberson in the presence of Chief of Police Teasley.

Progue also indicated that he was questioned again on Monday, which is doubtful, but, at any rate, Major Borland was present at those preliminary interviews and Progue always insisted that he was treated all right whenever Major Borland was present. In fact, his counsel was most insistent upon entering a stipulation to that effect (see Tr. page 996, page 613, lines 10-18).

Therefore, the gist of Progue's testimony is that during those sessions when Major Borland was present he was never beaten or struck and that nothing took place which caused him to make a statement. This is further borne out by the fact that he did not make any statement during the preliminary conferences while Major Borland was on the case.

On March 31st, after Washington had made his first recorded statement the previous evening at 9:20 P.M. (and after Washington and Williams had recovered the jacket and car coat belonging to them) and, further, after Washington and Williams made a recorded statement at the Sheriff's office during the day of March 31st, Pynes and Roberson informed Progue that Washington and Williams had made their recorded statements.

Likewise, on March 31st, after Washington and Williams made their re-enactments, Pynes and Roberson informed Progue of that fact. Then, the next day, on April 1st, Progue voluntarily told Pynes and Roberson about having let one James Henderson have a pistol which belonged to him. Pynes and Roberson went out and interviewed Henderson and as a result thereof learned that that was a different pistol from the one which had been used in the beating of Mr. Gow.

They returned to the jail and Progue voluntarily told them that he had had another pistol which he had let Herbert Young have and which he understood that Young turned over to Melvin Dixon. The two detec-

tives went out, interviewed Young and Dixon, and recovered that second pistol from a Captain Dooley of the Bossier Sheriff's Department at his home in Benton, Louisiana.

They returned to the jail on April 1st and showed Progue that pistol. Progue did not positively identify it but stated it "resembled" the one he had let Herbert Young have. Meanwhile, Washington and Williams identified the pistol as being the one Progue had used in beating Mr. Gow.

On April 2nd, the officers reduced to writing statements from Herbert Young, Melvin Dixon, James Henderson, Roosevelt Washington, and Johnny James Williams, all of whom signed their respective statements on that day. Shortly thereafter, the two detectives informed Progue that those persons had signed those statements.

On Monday, April 3rd, the officers recovered from one Pearlie B. Small, (the woman with whom Progue was living) at the home to which she had moved, a jacket which she identified as belonging to Progue. She also signed a statement relative to the two pistols and particularly about the pistol which had been recovered from Captain Dooley.

During the late afternoon of April 3rd, Progue was informed of the statement of Pearlie B. Small and, although he did not positively identify his jacket, he said it "resembled" one owned by him. At that point, Progue offered to make a statement telling of his part in the commission of the crime, which was

taken down and typed by Detective Pynes at Progue's dictation and signed by him at that same time.

Also, at that time, Progue offered to re-enact the crime at the scene. It being then about 8:50 P.M., the re-enactment was postponed until the next day.

On that next day, April 4th, during the middle of the morning, Progue accompanied Pynes and Roberson and made a re-enactment of the crime at the scene, pointing out his part and also what the other two men did. No other law enforcement officers were present but the son and other members of the family of the deceased were present at the Cafe.

When the two detectives returned with Progue from the scene they noticed that Washington and Williams were being transferred to the Parish Jail by other officers who had no connection with the case, so Pynes and Roberson then turned Progue over to the transferring officers at that time.

The factual matters relative to the giving of the Coroner's Statement by Progue during the afternoon of April 4th, and his signing the transcribed Coroner's Statement on April 7th, are the same as the other two respondents with two minor exceptions.

One of these exceptions was that after the Coroner read to Progue his Police Statement, Progue made two insignificant corrections therein, which the Coroner noted. The other variation is that, at Progue's specific request, the recording machine was cut off twice, during which intervals Dr. DeLee explained to Progue that if he wished to make a statement, it was

necessary that Dr. DeLee administer to him the oath to tell the truth.

The gist of Progue's testimony out of the presence of the jury as to why he felt that he was under coercion or duress and why he signed his statements, including the Coroner's Statement, was because he did not want his wife to be put in jail as a Material Witness and that he did not "want to get a beating" (Tr. page 632, lines 14 thu 17).

Yet, as the Trial Court pointed out in its Per Curiam (Tr. page 259),

> ". . . the State produced his common-law wife as a State witness and she was not examined by any defense counsel about any such matters as that."

See also Trial Court's ruling on this matter (Tr. 677, lines 2-16) to the same effect.

With reference to any alleged beating or threat of a beating, the State produced every single witness that ever had any contact with Progue at any time and all of them positively and categorically stated that no one ever struck, beat, or threatened Progue in any way and, therefore, on this point the issue is one of veracity and credibility. Each officer as to whom Progue made even the slightest hint of having mistreated him in any way specifically denied each hint or implication made by Progue.

On the matter of veracity and credibility, the Trial Court, in making its ruling, specifically said:

"It resolves to a question of credibility, and if

anything Progue proved on his testimony in this Court, it was that Progue cannot be believed . . ." (Emphasis ours.) Tr. 677, lines 26-30; 678, lines 1-4).

As shown by the Per Curiam of the Trial Court in the first two paragraphs on page 260 of the Transcript, Progue falsified his testimony when he said there were five persons present (including himself) at the time he gave his sworn Coroner's Statement, when there were actually only four persons present (including Progue), and the testimony of the other three persons was directly contrary to Progue's claim about an unknown, mysterious man. Also, in testifying under oath before the Trial Judge, Progue said that in his statement under oath made by him before the Coroner he swore to something that was not true.

Concerning the implications and inferences about the alleged beating, the following is an exact quotation of Progue's testimony on cross-examination out of the presence of the jury:

"Q When Commissioner Downs spoke to you at your cell on the one occasion when he spoke to you, you told him nobody had struck you. Is that correct?

A I told him nobody had struck me.

Q That is true?

A That was true.

Q It is still true?

A It is still true. Nobody struck me".
(Tr. page 633, lines 14-21).

Once more, on the matter of any alleged beating or other intimidation, the Trial Court in its ruling said:

> "Progue himself has testified to nothing that transpired intimidating him, nothing that happened to him, nothing that he said happened to him frightened him into making a statement; . . ." (Tr. 677, lines 17-19)

All of the references herein made to testimony taken outside of the presence of the jury shows that there was no real showing by any of the respondents as to anything which happened to them or was done to them to compel or induce them to make any of their statements.

Therefore, at the time the judge made his ruling, there was no definite or concrete evidence of any physical mistreatment of any of these respondents by any one. Then, after the jury returned and after the State laid its foundation in the presence of the jury by producing all of the officers who had had any contact with any of the respondents, there was still no evidence of any mistreatment, coercion, or inducement that could conceivably cause any one of the respondents to make any of the statements.

Therefore, when the Court actually admitted the statements into evidence in the presence of the jury, all the evidence before the Court and before the jury showed that the statements were freely and voluntarily made.

The above is set forth merely to show that any

subsequent testimony by any of the defendants, of a positive or definitive nature, asserting any alleged physical mistreatment or other alleged coercion, was definitely false and came as an afterthought by each defendant himself when he testified in his defense in the presence of the jury.

For example, Washington had already acknowledged out of the presence of the jury that his Coroner's Statement was free and voluntary and therefore the District Attorney did not even cross-examine him. Nevertheless, when he testified before the jury he greatly magnified and embellished his alleged claims of mistreatment. He did this by mentioning in the presence of the jury at least five or six items of asserted mistreatment which he freely acknowledged as being related by him for the very first time at that very moment (Tr. page 1100, 1101, 1104 and 1105).

In fact, he further admitted before the jury that some of these wild claims were on matters that he had never told to any one, not even to his attorney. He also acknowledged that one or two of these items occurred to him after he had heard Progue and Williams testify. In the last analysis, insofar as Washington is concerned, he restricted all of his alleged claims of mistreatment to the action of Lt. Pynes and Sgt. Roberson (mostly Roberson) (see Tr. page 1103, lines 28-30). Needless to state, on rebuttal before the jury, the State produced Pynes and Roberson again and they each specifically denied each and every allegation by Washington.

Therefore, this was a disputed matter of fact which was decided adversely to Washington by the jury in its verdict and by the Trial Court in overruling the Motion for New Trial. Moreover, Washington had the benefit of relating those asserted claims, which the State insists are false, to the jury itself.

With reference to Williams, the situation is almost the same (in his testimony in the presence of the jury) as in the case of Washington, except that Williams did not embellish his claims quite as much and did not "borrow" alleged items of mistreatment from the other two defendants.

The testimony of Williams before the jury on alleged mistreatment was shown by the State to be false in several particulars. One of these was the claim by Williams that Mrs. Frey, the Coroner's secretary, did not read back to him the Coroner's Statement at the time he signed it. Another false statement was his claim that he was questioned by Sgt. Roberson alone on a particular date in which the evidence was overwhelming to the effect that neither he, nor either of the other respondents, were questioned by any officer on that date.

Once again Williams confined his complaints as to mistreatment, as vague as they were, to Lt. Pynes and Sgt. Roberson. Both of these officers took the stand in rebuttal before the jury and denied categorically each of the few vague complaints made against them by Williams. Williams did testify on direct ex-

amination before the jury that he himself sent for Chief Teasley to tell the Chief that he wanted to make a statement (Tr. page 1010). This was at a time when he was not being questioned by any one.

With reference to the relator Progue, he added many items of alleged mistreatments to his testimony before the jury (as to which he had not testified out of the presence of the jury).

Progue acknowledged that nothing was ever done during the time that Major Borland was connected with the case that would cause him to make any statement. He repeatedly stated that no alleged promises and no alleged profanity caused him to make any statement. In fact, he confined his claim of coercion almost completely to alleged physical mistreatment to the actions of Lt. Pynes and Sgt. Roberson. On cross-examination in the presence of the jury, he admitted that in at least ten separate instances that the alleged claims of mistreatment by them were being told by him for the first time and that he had not mentioned those items at all previously in the trial when the jury was out. (See Tr. pages 1196, 1197, 1198, 1199, 1200, and 1201.)

Similarly, he insisted on making a demonstration to the jury about places he was allegedly struck but said that he did not make such a demonstration to the judge earlier in the trial because there was no jury present to look. In many instances on his direct examination before the jury, instead of answering the question from his own counsel, he would recite alleged

items of mistreatment that were not even responsive to the question. In fact, on occasions, his own counsel would call him back to the question. He also acknowledged that some of the alleged items of mistreatment had never been related to his attorney.

The true test of admissibility of a confession is whether the confession was made freely, voluntarily, and without compulsion or inducement of any sort. (*Haynes v. State of Washington*, 373 U.S. 503, 83 S.Ct. 1336, *Malloy v. Hogan*, 378 U.S. 1, S.Ct. 1489) Volunteered statements of any kind are not barred by the Fifth Amendment to the United States Constitution. *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602.

The awareness of right to remain silent is now a threshold requirement for the intelligent decision as to its exercise where there is an incustody interrogation (*Miranda v. State of Arizona, id.*) *but* this requirement has been held to be applied prospectively only from the date of the *Miranda decision* (*see Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed 2d *Davis v. State of North Carolina*, 384 U.S. 737, 86 S.Ct. 1761 (1966). The attention of the Court is directed to the fact that these respondents were tried and sentenced on June 17, 1961; therefore, the requirement does not apply in this case.

As far as the law of Louisiana is concerned, it is well settled that the question as to whether a statement or confession was "given freely and voluntarily is a question of fact, which addresses itself to the dis-

cretion of the Trial Judge." *See: State v. Edwards*, 232 La. 577, 94 So.2d 674; *State v. Isacc Peart*, 232 La. 111, 93 So.2d. 920. The State Trial Court found that the statements were free and voluntary.

The facts of these cases, like the facts of *Johnson v. State of New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966), show that the confessions should not be held as involuntary. In the Johnson case, the relators therein gave confessions which were offered in a joint trial for felony murder, like the instant case. The judge held a hearing out of the presence of the jury on the voluntariness of the confession, like the judge did in the instant case. The only difference being that the relators in the Johnson case did not bring into the hearing alleged violation until they filed collateral attacks upon the trial for alleged violation of their constitutional rights. In this case the respondents did not set forth any alleged violation of their rights during the hearing of the Trial Judge in which he determined that the confessions were admissible.

It was admitted by each that they had not testified to the alleged acts on the hearing before the judge which they testified to before the jury. From a reading of the facts which are set out above and a reading of the testimony, the court will see that the alleged mistreatment is obviously false. It would seem that if the alleged acts had been committed, the respondents surely would have testified to the facts on the hearing before the judge on the admissibility of the confession and further would surely have told their counsel of the alleged acts. Progue acknowledged that some of the

alleged facts of mistreatment which he testified about before the jury had never been related to his attorney. Once he started weaving his story, he was carried away by his own story and related being questioned on a day which he had previously acknowledged that he was not questioned at all by anyone and even after having had his earlier testimony read back to him, he continued to stick by the story he was then telling.

On rebuttal before the jury, Pynes and Roberson specifically and emphatically denied each of the false statements of abuse made by Progue against them and of the other respondents. This is a question of fact and also a question of credibility of witnesses. The overwhelming evidence cannot be destroyed by the vague assertions made by Williams, nor the false exaggeration made by Washington and Progue, in the presence of the jury, on matters not testified to by them out of the presence of the jury.

The real question is whether or not anything transpired between the time of the arrest of any one of these respondents and the time they made any statements which coereed or induced him to make a statement. If there was no such occurrence, then the statements were admissible.

For example, in *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141, the accused was arrested without a warrant and placed in jail in Texas. He could not read or write English and four days later he made a confession in the Texas jail about committing a homicide in Nebraska. His statement was written in English, it

was read to him in Spanish, and he signed it. He was kept in jail four more days in Texas with no homicide charge being filed. After being taken to Nebraska, he was questioned again by three Nebraska officers, through an interpreter, and he confessed again, which was thirteen days after his original arrest. Finally, he was taken before a County Judge for a preliminary hearing twelve days later, making a total of 25 days from the time of his arrest until the time he was taken before a magistrate. Nevertheless, the United States Supreme Court held that the confession (made in Texas) was admissible in evidence, because nothing took place that coerced him into making a statement. *See also: Crooker v. California*, 357 U.S. 444, 2 L.Ed. 2d, 1448, 78 S.Ct., 1287 (death sentence affirmed); *Ashdown v. Utah*, 357 U.S. 426, 2L.Ed. 2d., 1443, 78 S.Ct. 1354; *Stein v. New York*, 346 U.S. 156, 97 L.Ed. 1522, 73 S.Ct., 1077 (death sentence affirmed); *Brown v. Allen*, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (death sentence affirmed); *Stroble v. California*, 343 U.S. 181, 96 L.Ed. 872, 72 S.Ct. 599 (death sentence affirmed); *Taylor v. Alabama*, 335 U.S. 352, 92 L.Ed. 1935, 68 S.Ct. 1415; *Lyons v. Oklahoma*, 322 U.S. 596, 88 L.Ed. 1481, 64 S.Ct. 1208; *Lisenba v. California*, 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280 (death sentence affirmed). *See also* Annotation in 1 L.Ed. 2d, 1735, at p. 1743 and 1745.

In *Lisenba v. California, supra*, the original arrest was on April 19, and, after refusing several times to make a statement, the defendant made a confession on May 2, fourteen days later. The United States

Supreme Court held that the statement and confession of the accused was not caused by his detention for any specific number of days, nor by his being questioned on several different days. On the contrary, the Court held that he actually made his confession because of the mounting evidence, (including the statement of an accomplice) with which he was confronted. The Court further held that it was because of this mounting evidence that he voluntarily made his own decision to give a full statement.

The reasoning in that case is peculiarly applicable to respondents Williams and Progue in this case. This is especially true of Progue who knew that the other respondents had made statements and reenactments, that certain garments and his (Progue's) pistol had been recovered and identified, and that statements had been signed not only by Williams and Washington but by Melvin Dixon, Herbert Young, James Henderson, and Pearlie B. Small, the latter being the girl friend of Progue.

We now turn to the question of the alleged unlawful search and seizure. The relators allege that the gun used in evidence was secured by an unlawful search and seizure. This is not true, as the gun was in the possession of Deputy Vol Dooley of Bossier Parish. He had taken the gun from a negro man, a person other than relator, as a concealed weapon, who had won it in a dice game. It was lost in the dice game by a negro who had purchased it from Progue. As this was the chain of events which led to the recovery of the gun it could not be claimed by respondents herein

that it was illegally seized as it was not taken from them.

Next we look to the facts surrounding the obtaining of Williams' checked car coat. Williams told the officers that the coat that he had on at the time of the murder had been given to his brother. He went willingly with the officer to identify the coat which was at his brothers' house. This was not his home, therefore, it was not an unlawful search and seizure but was voluntarily given to the officer by the brother.

Washington's coat was also introduced into evidence. After Washington had given his confession he agreed to go with the officers and point out the coat he wore on the night of the murder. An unlawful search and seizure is one made without the consent or permission of the accused. If he consents to the search or seizure then it is lawful and there is no need for a search warrant. This is certainly the case of Washington. He cannot at this late date urge that he did not consent to point out the coat.

The officers went to the home of Progue's girl friend and there made upon her the request for the coat which he was wearing the night of the murder and she gave it to them. This home was let to her and not to Progue. She was in full charge of it; therefore, when she turned the coat over to the officers and there was not an unlawful search and seizure. It is stated that she was forcefully abducted from the house but this was not the case.

Petitioner further argues that in the event of

any question as to the application of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 it should be noted that the United States Supreme Court held in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 that the rule of Mapp case was to have prospective application only. The Mapp case was decided several days after the conviction of the respondents herein.

It appears that in considering the "totality of the circumstances", the Federal District Court's decision is primarily based upon the length of time respondents were in custody and occasional brief interrogations. The lower court has completely excluded from its decision the *alleged physical* mistreatment of Appellees and makes no reference to any physical or mental infirmity of respondents which might cause them to succumb to any subtle coercion that might be applied against them by the authorities.

It is submitted that no cases have been found where a Court has failed to buttress its opinion holding a confession to be involuntary with some discussion regarding some mental or physical infirmity of the accused. For example, the lower Court relies upon *Clewis v. Texas*, 386 U.S. 707 (1967) and *Davis v. North Carolina*, 384 U.S. 737 (1966), both of which involved different factual situations than those presented here.

In *Clewis*, the Supreme Court made much of the *physical coercion* employed against the accused, stating that his "faculties were impaired by inadequate sleep and food, sickness *and* (emphasis supplied) long

subjection to police custody. . . ." Of further importance was the fact that the accused had only a fifth grade education.

In *Davis*, the Court also talked of substantial coercion influences, one of which was *lack of food* which "may well have had a significant effect on Davis' physical strength and therefore his ability to resist."

In light of the above, petitioner shows that the holding of the lower Court is a departure from the prior rulings of the U.S. Supreme Court.

Of course, prior to *Miranda v. Arizona*, 384 U.S. 436 (1966), a confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. *Ziang Sung Wan v. U.S.*, 266 U.S. 1; *Hopt v. Utah*, 110 U.S. 574; *Sparf & Hansen v. U.S.*, 156 U.S. 51; *Pierce v. U.S.*, 160 U.S. 355; *Wilson v. U.S.*, 162 U.S. 613; *Bram v. U.S.*, 168 U.S. 532; *Hardy v. U.S.*, 186 U.S. 224; *Powers v. U.S.*, 223 U.S. 303; *Bilokumsky v. Tod*, 263 U.S. 149.

The basic question is simply whether the will of the accused has been overborne. *Lyman v. State of Ill.*, 372 U.S. 528; *Haynes v. State of Washington*, 373 U.S. 502.

It is submitted that the lower Federal Court has allowed the recent U. S. Supreme Court decisions regarding the voluntariness of confessions to be applied retroactively, the Court determining that the respondents in the instant case did not receive a "fair trial"

under *present standards*, as opposed to whether a "fair trial" was granted these respondents under the law as it existed at the time of their trial in 1961. Under *Johnston v. New Jersey*, 384 U.S. 719, such a retroactive application of *Miranda* and related decisions is not authorized.

The lower Court has also pointed out that respondents were not brought before a committing magistrate "without unnecessary delay". It is submitted, however, that the rules for the Federal Courts laid down in *McNabb v. U.S.*, 318 U.S. 332, and *Mallary v. U.S.*, 354 U.S. 449, (requiring exclusion of confessions if an accused is not promptly brought before a committing magistrate) have never been applied to the States. *Gallegos v. Nebraska*, 342 U.S. 55; *Stein v. N.Y.*, 346 U.S. 156; *Carpenter v. U.S.*, 264 F. 2d 565, cert. den., 360 U.S. 936; *Cato v. Alvis*, 288 F. 2d 534; *Smith v. Heard*, 315 F. 2d 692; *U.S. ex rel Smith v. New Jersey*, 322 F. 2d 810; *Young v. Wainwright*, 326 F. 2d 255; *Ralph v. Pepersack*, 335 F. 2d 128; *Crooker v. California*, 357 U.S. 433. The states have been left to determine whether confessions which have been made while the accused is in custody were, in fact, voluntary.

It is submitted that no undue weight should be given to a failure to timely arraign, or to formulate an exclusionary rule of evidence based upon *McNabb* and *Mallary* which would cause a confession, otherwise voluntary, to be *considered involuntary, due to the mere passage of time.*

It is further submitted that the lower Court has placed undue emphasis upon the alleged incarceration of Progue's common-law wife. It is apparent that Progue's confession was not induced by any coercion or pressure, but simply because the evidence was mounting against him. By the time Pearlie B. Small came to the Police Station, Washington and Williams had already confessed, thereby implicating Progue. Also, Pearlie B. Small had identified Progue's coat and pistol.

As with the accused in *Lisenba v. California*, 314 U.S. 219, the interrogation of Progue "would never have drawn an admission from him had his confederate not made a statement." The "will was not overborne," through coercion by the authorities in relation to Progue's common-law wife, or any other pressure or intimidation. Progue's statement was made simply because of the evidence against him. (Compare Progue's testimony quoting Police Commissioner Downs, who had known Progue prior to the arrest, this being the day before Progue made his statement: "Well, Progue, if you haven't done it, don't say you done it, because they would have to prove it." That certainly is *not* any coercion by which his "will was overborne.")

Aside from the points set forth above, it appears that no real coercion was employed against any of the respondents. Progue made a statement because of the evidence against him. Williams and Washington voluntarily revealed their part in the crime. Had there been any intimidation or coercion, it appears that they would have made this known to the members of the

news media who were present at the time of the re-enactments at the scene of the crime. They could have "told the world" of their plight, had their action not been voluntary.

It is further submitted that although it is the duty of this Court to examine the entire record to determine the voluntary nature of the statements, this examination should be limited to a determination of whether the trial court and jury *could reasonably conclude* that the confessions of these respondents were voluntary. The fact that there is evidence which *might* justify a contrary conclusion is immaterial.

The real question is whether the conclusions of the State Trial Court and jury are so illogical and unreasonable that to give them effect would work that fundamental unfairness which is at war with due process. *Lisenba v. California*, 314 U.S. 219; *Lyons v. Oklahoma*, 322 U.S. 596.

In the instant case ample evidence was submitted to the State Trial Judge, out of the presence of the jury, and subsequently before the jury, for a determination of the question as to whether the statements were made freely and voluntarily without inducements or coercion.

The State Trial Judge, relying upon the jurisprudence *in existence at that time*, followed the law as announced by the United States Supreme Court and the Louisiana Supreme Court. Without exception, in every case decided prior to 1961 in which a confession had been excluded, there had been *undisputed*

facts showing *mistreatment of the accused* or some physical or mental *defect on his part.* Such facts were *not true in this case,* as found by the State Trial Judge and jury. Even in *Culombe v. Connecticut* (June 19, 1961), 367 U.S. 568, 6 L. Ed. 2d. 1037, 80 S. Ct. 1860, (decided two days after the jury verdict in this case which decision encompassed four separate United States Supreme Court opinions), the accused was a mental *defective,* the officers used *subterfuge* upon him, they acknowledged that the *detention was to elicit a confession by every possible means,* and his *request for counsel* was *frustrated by the police. None* of these elements were *present in the instant case.*

In the instant case, *these defendants were not* mentally defective, weak, suggestible or afraid of their co-defendants (as in *Culombe v. Connecticut*). Washington was twenty-seven years old and in full possession of his faculties. Progue was twenty-seven, had served one term in the State Penitentiary for burglary in 1955 and had had contact with police officers. Williams was twenty-four and his testimony shows that he had considerably more than average intelligence. *Williams* even stated that he had prayed about the matter and, *of his own volition, sent for the Chief* of Police in order *to make his statement,* long after any interrogation and after a night's rest, (State Transcript, page 481). These men were not held incommunicado; part of the time two of them were in the same cell; part of the time one or more of them had a cell surrounded by a walk-around and by which

they could pass messages and cigarettes back and forth to persons in cells on each side. Only on one occasion was any one man questioned for more than an hour. There were *some days* on which *not any of them were questioned* at all by anyone. They were each given an opportunity *to call for their attorney* and an *opportunity to use to telephone.* In fact, *Progue's common-law wife told one of the officers that Progue had called her by telephone.*

Before each man made his statement to the *coroner* he was notified that he did not have to make a statement unless he wished to do so voluntarily. *This is the same as being notified of his right to remain silent.* (This case was tried long before *Escobedo and Miranda.*) The State contends that an arrest without a warrant, failure to advise the accused of their constitutional rights (to have an attorney, to remain silent, etc.), and failure to take the accused before a Committing Magistrate, (even though the last thing might be a violation of State law) *do not* void a subsequent confession. See *Smith v. Heard* (1963-C.A.5) 315 F. 2d. 692; (*Death* sentence, affirmed), *Young v. Wainwright* (1964-C.A. 5) 326 F. 2d. 255, (3 *Death* sentences, affirmed), and *Cato v. Alvis,* (1961-C.A.6) 288 F.2d. 530.

In *Cato v. Alvis, supra,* the accused *complained* that he was subjected to "*persistent and prolonged interrogation*" and that he was "*prohibited from seeing his purported wife* until after he had made a statement." The Court found, relative to his common-law wife, that "the officers were holding her as a witness

and would not let her talk to him until they had his story." (He also complained as to failure to notify him as to right to an attorney, to remain silent and to be taken before a Committing Magistrate.)

Nevertheless, the Court held that the statements were admissible in evidence, the court relying upon *Gallegos v. Nebraska*, *Stein v. N.Y.*, *Lyons v. Oklahoma*, and *Lisenba v. California*, which are the same cases relied upon by the State of Louisiana herein and which were affirmed in *Culombe v. Connecticut*. These cases are *not* overruled or modified.

The Court of Appeals for the Fifth Circuit has held that

> ". . . it is the illegal detention *in certain circumstances* which will vitiate a confession, *not* the illegal arrest and *subsequent detention in every case.*
>
> "There *must also be a causal connection* between the failure to take before a magistrate and the coerced confession." *Smith v. Heard, supra.* (Emphasis supplied.)

Again, we come to the crux of the question of whether these confessions were voluntary, i.e., was the will of each accused overborne by some *improper action* on the part *of the authorities* which *caused* the accused to confess. We submit *not*. As the Court stated in *State v. Traub*, 151 Conn. 246, 196, A. 2d. 755 (1963), which language was quoted with approval in *State v. Vangen*, 433 P. 2d. 691 (1967):

> "Even though a detention is illegal, if the confession is truly voluntary and the *causation factor*

of the illegal detention is *so weak*, or has been so attenuated as not to have been an operative factor in causing or bringing about the confession, then the connection between any illegality of detention and the confession may be so lacking in force and in intensity that the *confession would not be the fruit of the illegal detention.* (151 Conn. page 250, 196 A. 2d. page 757." (Emphasis supplied.)

Here, Williams and Washington voluntarily revealed their part in the crime; there is no believable evidence to indicate that anything done by the authorities caused them to implicate themselves in the crime. Their wills were *in no manner overborne by* the action of *the authorities.* As to Progue, his confession was made, not because of any improper influence by the authorities, but due to the evidence against him. When confronted with this evidence, he knew there was no point in contending that he was innocent. His situation was similar to that of the accused in *Lisenba, Gallegos* and *Vangen,* supra. It was *not any improper action* of the authorities which "overbore his will" or *"caused" him to confess, but the* continually *mounting evidence* with which he was confronted. Faced with this evidence, *he voluntarily elected* to make his confession.

In connection with the detention of these three respondents, it must be remembered that the police officers who were investigating were making a thorough investigation of the crime and of the stories related to them by Washington and Williams. This procedure of holding an accused while an investigation progresses

is not prohibited at this time, even by *Miranda*. Also, the Court will note that *in none of the statements* given by these three respondents *did any admit* that *he actually struck the blows which killed Jang Gow*. Had the police officers desired an actual confession, it would appear that these respondents would have been forced and compelled to state who actually killed the victim of the crime. However, this was not the case. These respondents voluntarily related their respective parts in the crime, but none admitted having actually struck the fatal blows and *none of these respondents were compelled or forced to do so by the authorities.*

Turning now to a discussion of an additional one final point in connection with the issue of illegal search and seizure, relator presents as part of this writ the following reasons:

Since this case was tried in the State Court in June, 1961, (which was prior to the decision in *Mapp v. Ohio*), Louisiana was not bound by the exclusionary rules set forth therein and, therefore, the question of whether the arrests were based on something less than reasonable cause was irrelevant and immaterial. Nevertheless, the record herein shows that Detective Roberson had certain leads which he discussed with his superior, Major Borland, which convinced him that there was reasonable cause to believe that these defendants had committed this felony and, *based upon these leads, the arrests were made.* In this connection, the statement of the Federal District Court that these men were booked on "suspicion of homicide" and were,

therefore, illegally detained, should be considered in light of the following language from *Ralph v. Pepersack* (1964-C.A.4) 335 F. 2d 128 (*Death* sentence, affirmed):

> "At the time of Ralph's arrest, the District of Columbia had *no statute* or ordinance *prohibiting arrest for investigation* where probable cause was present . . . of course, there is no such crime as investigation, but this description given by the officer does not go to the question of probable cause. . . . *There is no constitutional prohibition against arrest for investigation* where probable cause exists. Certainly *not every official impropriety* gives rise to a finding that due process has been denied." See also *Stevens v. Warden*, 366 F. 2d. 565, 1966. (Emphasis supplied)

The *Trial Judge* in the State Court specifically *ruled* that there were *no illegal arrests* and *no illegal detention* (See State Transcript, page 675). However, *this was completely ignored by the Federal District Judge*, even though the State Supreme Court affirmed the conviction. In other words, the Federal District Judge did not accept the State Court's authority as to the law in Louisiana in 1961 in this regard. We submit that the Federal District Judge has inadvertently been guided by 1967 Federal standards instead of applying the Louisiana law which existed at the time of these arrests, as should have been done under *Ralph v. Pepersack*, supra, and as the Fifth Circuit Court did in *Smith v. Heard* (1963-C.A. 5) 315 F. 2d. 692 (*Death* sentence, affirmed).

CONCLUSION

Considering the gravity of several errors by the Federal District Court, now affirmed by the United States Court of Appeal for the Fifth Circuit, the petition for a writ of certiorari should be granted.

Respectfully submitted by;

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CERTIFICATE

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, counsel for relator herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of August, 1968, I served a copy of the foregoing petition for certiorari to the Supreme Court of the United States on Albert George Progue, Johnny James Williams and Roosevelt Washington, respondents herein, by mailing a copy thereof, in a duly addressed envelope, with first class postage prepaid, to Dan A. Spencer, counsel of record for said Progue, Williams and Washington, at Suite 7, Dixie Building, 1639 Kings Highway, Shreveport, Louisiana.

Baton Rouge, Louisiana, this ..... day of August, 1968.

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